IP 02-0536-C B/S NCP Inc v Steve Carter
Judge Sarah Evans Barker Signed on 09/02/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NATIONAL COALITION OF PRAYER INC, PARALYZED VETERANS OF AMERICA THE KENTUCKY INDIANA CHAPTER, INDIANA TROOPERS ASSOC INC*, INDIANA ASSOCIATION OF CHIEFS OF POLICE FOUNDATION, Plaintiffs, vs. CARTER, STEVE IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF INDIANA, Defendant.	CAUSE NO. IP02-0536-C-B/S

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NATIONAL COALITION OF PRAYER, INC. et al., Plaintiffs,	)	
vs.	)	IP 02-0536-C B/S
STEVE CARTER, Defendant.	)	

ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' and Defendant's cross motions for summary judgment on Plaintiffs' constitutionally-based lawsuit seeking a declaratory judgment that the prohibitions against telephone sales calls, as contained in the Indiana Telephone Privacy Act, Ind. Code § 24-4.7 *et seq* (the "Act" and the "do-not-call" list or statute), violate the First and Fourteenth Amendments of the United States Constitution as well as Article 1, Section 9 of the Indiana Constitution. The National Coalition of Prayer, Inc., Kentucky-Indiana Chapter of Paralyzed Veterans of America, Inc., Indiana Troopers Association, Inc., and Indiana Association of Chiefs Police Foundation (collectively "Plaintiffs") are all Indiana nonprofit and/or charitable organizations who claim substantial harm from the Act's prohibitions against their use of professional telemarketers. All four Plaintiffs maintain tax-exempt status under § 501(c) of the Internal Revenue Code and affirm that they routinely rely or have relied on the assistance of professional telemarketers to appeal for public financial support. Plaintiffs contend that the Act constitutes a content-based regulation which impermissibly restricts their fully-protected speech and that the Act is also an impermissible prior restraint on speech, preempted

by federal regulations, and unconstitutionally interferes with Plaintiffs' right of association. Defendant Steve Carter, the Indiana Attorney General, ("Defendant") counters that the Act by merely effectuating the choices of individuals not to receive telemarketing calls is constitutional or, in the alternative, that the statutory restrictions impose a content-neutral limitation on the manner in which telephone sales calls can be made. For the reasons elaborated below, we hold that the Act is a constitutionally-valid, content-neutral time, place, and manner restriction and, therefore, we GRANT Defendant's Motion for Summary Judgment and DENY Plaintiffs' Motion for Summary Judgment.

Factual Background

1. *Background Developments Leading to Enactment of the Act.*

Residential telemarketing has become a popular and, we assume, a successful method by which businesses and charities conduct large-scale sales or fundraising campaigns. The private individuals targeted by such telephone campaigns, however, increasingly view the sales calls as an unwelcome intrusion into their residential privacy. See Telemarketing Sales Rule, Notice of Proposed Rulemaking, 67 Fed. Reg. 4491, 4518 nn. 246-247 (Jan. 30 2002) (to be codified at 16 C.F.R. pt. 310) (citing two studies, the first showing telemarketing was rated the third most bothersome everyday experience, with 49% of respondents giving telemarketing the highest annoyance rating, indicating they were "completely fed up," and the second showing that 80% of respondents found telemarketing calls to be annoying and intrusive).

The increased prevalence of telemarketing calls has also become a matter of concern by state legislatures across the country, as well as in Congress. In 1991, after the United States Senate conducted hearings on this issue, it determined that there then existed "more than 180,000 solicitors [who] were using automated machines to telephone 7 million people each

day." Moser v. F.C.C., 46 F.3d 970, 972 (9th Cir. 1995) (citing S.Rep. No. 102-178, 102d Cong., 1st Sess. (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970.)).

The ability of telemarketers to intrude into the privacy of Indiana residents and inundate them with sales calls has been similarly well-documented. For example, a telemarketing supervisor, in testimony provided in a recent state court trial relating to the Act, stated that each month a single four-hour shift at her business could dial 16,000 telephone numbers. (Certified transcript from Steve Martin & Assoc. v. Carter, No. 82 CO1-02010PL-38 (testimony of Leola Mills)). In addition, the Indiana General Assembly determined that telemarketers often time their calls to occur when residents least want to receive them, such as during their evenings at home. See, e.g., Dec. of Brent C. Embrey and attached exhibits; Milton Zall, Telemarketing Techniques Designed to Increase Business, Air Conditioning, Heating and Refrigeration News, March 13, 2000, available at 2000 WL 14759916 at 2 (advising businesses to call residences in the "late afternoon or early evening").

Initial legislative initiatives attempted to stem the tide of telemarketing calls by creating company dependant "do-not-call" lists, which required individuals to place their telephone numbers on do-not-call lists on a company-by-company basis.[1] These regulations, for obvious reasons, proved ineffective in stemming the tide of unwelcome calls. See, e.g., Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4579, 4631 n. 606 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310) (finding: "The record in this matter overwhelmingly shows . . . that company-specific approach is seriously inadequate to protect consumers' privacy from an abusive pattern of calls placed by a seller or telemarketer").

[1] With company dependent do-not-call lists, individuals must inform each telephone solicitor separately of their desire not to receive telephone solicitations.

In response to this mounting problem, the Indiana General Assembly in 2001 enacted the Indiana Telephone Privacy Act (the "Act"), which imposed broad prohibitions against telephone sales calls to Indiana residents, essentially prohibiting any persons or organizations (with limited exceptions) from making a telephone sales call to an Indiana resident who has registered a telephone number with the Indiana Attorney General for inclusion in the Indiana "no telephone sales solicitation listing." The Act became enforceable on January 1, 2002.

2. *Relevant Language of the Act:*

The Act's primary, operative provision states:

> A telephone solicitor may not make or cause to be made a telephone sales call to a telephone number if that telephone number appears in the most current quarterly listing published by the division. (IC 24-4.7-4-1)

The Act also contains the following relevant definitions:

> "Telephone solicitor" means an individual, a firm, an organization, a partnership, an association, or a corporation, including affiliates and subsidiaries, doing business in Indiana. (IC 24-4.7-2-10)
>
> "Doing business in Indiana" means making telephone sales calls to consumers located in Indiana whether the telephone sales calls are made from a location in Indiana or outside Indiana. (IC 24-4.7-2-9)
>
> "Telephone sales call" means a telephone call made to a consumer for any of the following purposes:
> (1) Solicitation of a sale of consumer goods or services.
> (2) Solicitation of a charitable contribution.
> (3) Obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.
>
> The term includes a call made by use of automated dialing or recorded message devices. (IC 24-4.7-2-9)
>
> "Listing" refers to the no telephone sales solicitation listing . . . that lists the names of persons who do not wish to receive telephone sales calls. (IC 24-4.7-2-7)

The Act explicitly does <u>not</u> apply to any of the following:

(1) A telephone call made in response to an express request of the person called.
(2) A telephone call made primarily in connection with an existing debt or contract for which payment or performance has not been completed at the time of the call.
(3) A telephone call made on behalf of a charitable organization that is exempt from federal income taxation under Section 501 of the Internal Revenue Code, but only if all of the following apply:
(A) The telephone call is made by a volunteer or an employee of the charitable organization.
(B) The telephone solicitor who makes the telephone call immediately discloses all of the following information upon making contact with the consumer:
(i) The solicitor's true first and last name.
(ii) The name, address, and telephone number of the charitable organization.
(4) A telephone call made by [a licensed real estate broker or salesperson] if:
(A) the sale of goods or services is not completed; and
(B) the payment or authorization of payment is not required; until after a face to face sales presentation by the seller.
(5) A telephone call made by [a licensed insurance producer] or [surplus lines producer] when the individual is soliciting an application for insurance or negotiating a policy of insurance on behalf of an insurer (as defined in IC 27-1-2-3).
(6) A telephone call soliciting the sale of a newspaper of general circulation, but only if the telephone call is made by a volunteer or an employee of the newspaper. (IC 24-4.7-1-1)

3. *The Act's Impact in Indiana.*

To quantitatively measure the Act's efficacy, the Indiana Attorney General's office commissioned a scientific survey to determine and document the impact of the Act's prohibitions on telemarketing activity in Indiana. The survey, based on a random sampling of registered and unregistered telephone subscribers, found that individuals who joined the no-telephone-sales-solicitation listing experienced an 84% decrease in the average volume of

"telemarketing calls received per week."[2] Individuals who elected not to join the no-telephone-sales-solicitation listing experienced a decline of only 32% in the average volume of "telemarketing calls received per week."[3] See generally Dec. of Tom W. Smith and attached Exs. B, C, D.

This empirical evidence explains a widely popular response by Indiana residents to the Act. As of March 1, 2003, over 1.2 million telephone numbers were registered in the no-telephone-sales-solicitation listing, comprising nearly half of the 2.5 million residential lines in place in Indiana. Dec. of Brent C. Embrey ¶¶ 22, 23. Similarly, as of March 1, 2003, the Indiana Attorney General's office had received in excess of 2,000 emails and letters, and more than 1,100 phones calls, from Indian residents registering their support for the Act.

Plaintiffs have brought this action mounting a facial challenge to the Act under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 9 of the Indiana Constitution.

Legal Analysis

I. *Plaintiffs' Standing to Facially Challenge the Act.*

Before determining the issues directly relating to the constitutionality of the Act, we first address the proper scope of our analysis. Plaintiffs challenge the Act's general prohibition against telephone sales calls to registered telephone numbers, as well as the five referenced

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[2] The mean weekly call volume decreased from 12.1 calls per week before the implementation of the Act to 1.9 calls per week after the Act became enforceable.

[3] The mean weekly call volume decreased from 11.4 calls per week before the implementation of the Act to 7.7 calls per week after the Act became enforceable. The report prepared for the State by Tom W. Smith described this drip as a 28% decrease in average call volume.

statutory exceptions: (1) calls made by employees or volunteers of a charitable organization; (2) calls made by licensed real estate agents; (3) calls made by licensed insurance agents; (4) calls by an employee or volunteer of a newspaper of general circulation; and (5) calls made to solicit political contributions. IC 24-4.7-4-1 and IC 24-4.7-1-1(3)-(6).[4]

One of the limits on our discretion in passing on the constitutionality of a legislative enactment is the requirement of standing on the part of a plaintiff. "This [c]ourt, as is the case with all federal courts, has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." New York v. Ferber, 458 U.S. 747, 768 n.20 (1982) (internal quotation omitted). Our power to adjudicate the constitutionality of a statute is limited by two specific restrictions: first, we are "never to anticipate a question of constitutional law in advance of the necessity of deciding it" and, second, we are "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Id. These constraints are embodied within the requirement of "standing," which has three elements:

> First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

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[4] The Act also exempts calls "made in response to an express request of the person called," and calls "made primarily in connection with an existing debt or contract for which payment or performance has not been completed at the time of the call," IC 24-4.7-1-1(1) and (2); however, neither of these two exceptions has been specifically challenged by Plaintiffs in this litigation.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (internal quotations and footnote omitted). These required elements of standing provide "that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." Ferber, 458 U.S. at 767 (citations omitted).

The Supreme Court recognizes a limited "overbreath" standing exception for certain types of First Amendment claims, that is, in a "[g]iven . . . case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980) (citations omitted). The Supreme Court has specifically held this "overbreath" standing exception does not apply in cases where the "parties not before the court" whose rights the plaintiffs seeks to assert are purely commercial speakers. See Bates v. State Bar of Arizona, 433 U.S. 350, 380-81 (1977); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505 n.11 (1981) ("We have held that the overbreadth doctrine . . . will not be applied in cases involving "commercial speech").

Applying these rules, we move on to examine each provision of the Act separately to determine whether Plaintiffs have standing to challenge its constitutionality. Plaintiffs here clearly have standing to challenge the provisions of the Act which directly impact on their own conduct, namely, the Act's general prohibition against telephone sales calls, as well as the exception for telephone sales it made by volunteers or employees of a charity. IC 24-4.7-4-1; IC 24-4.7-1-1(3).

However, Defendant correctly asserts that Plaintiffs lack standing to challenge the three other statutory exceptions applicable to purely commercial speakers (i.e. insurance agents, real

estate agents, and newspapers). Because all commercial speakers under the Act's exceptions are prohibited from using professional telemarketers, including Plaintiffs, Plaintiffs cannot demonstrate that the Act places them at any special disadvantage because the other commercial exceptions do not apply to them.[5] Absent a direct injury, the only way a challenge can be properly asserted regarding these three commercial exceptions would be by directly aggrieved parties, none of whom are before the court in this case.[6] Accordingly, Plaintiffs lack standing to challenge the constitutionality of the statutory exceptions for real estate agents, insurance agents, and newspapers. We therefore shall omit a discussion of those parts of the statute from our constitutional analysis.[7]

The remaining statutory exception for political contributions presents a confusing situation. Although both parties maintain that such an exception exists, we find no reference in the text of the Act to a specific mention of or basis for exempting calls for political contributions. The government offers an explanation, of sorts, for this silence and resultant

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[5] In fact, the exceptions granted to insurance agents and real estate agents are even more restrictive since the telephone sales calls permitted in those two exceptions can only be made by the respective licensed agents themselves, and not their employees or volunteers.

[6] Commercial parties who were not granted similar exceptions include, for example, news magazines or doctors.

[7] We recognize that § 24-4.7-1-1 of the Act requires volunteers or employees calling on behalf of charities to disclose certain information, including the solicitor's name and the name, address, and telephone number of the charity on whose behalf he is calling, and that commercial solicitors are not required to make those same disclosures. A related provision of the Act, § 24-4.7-4-1, requires all telephone solicitors to disclose their names as well as the names of the businesses on whose behalf they are calling; there is no requirement in this provision, however, that disclosures be made of the solicitors' addresses or telephone numbers of the business. Thus, under these two provisions, telephone solicitors calling on behalf of charities are required to disclose more information than callers for commercial entities. Plaintiffs have not raised this specific issue, however, and we see no obligation to address it independently in this entry.

confusion, describing the political contribution exception as an "implicit exclusion" from the Act's provisions. See Def.'s Resp. Brief at 55. However, the parties have failed to explain the source of any "implicit exclusion" or, assuming it exists, how it functions in practical terms or what its legal boundaries are. Thus, our analysis here will not address calls seeking political contributions, since we are totally in the dark as to how those terms are to be defined and whether such callers may or may not also utilize the services of professional telemarketers. Without specific statutory grounding, we are unable determine the relationship of the implied political contribution exception, if any, to the Plaintiffs in this litigation, never mind its constitutionality.[8]

In summary, we hold that these Plaintiffs have standing to challenge only the Act's general prohibition against telephone sales calls (IC 24-4.7-4-1) and the single, specific statutory exception for charities, so long as it is their employees or volunteers who make the telephone sales calls (IC 24-4.7-1-1(3)).

II. *Standard of Review*

In determining the appropriate standard of review in passing on the constitutionality of this Act, Plaintiffs contend that the statute is subject to strict scrutiny under the First Amendment as a content-based restriction on speech, because the Act discriminates between various

[8] Plaintiffs have not argued that the "implicit exclusion" for political contributions is unconstitutionally vague nor whether an exception for political speech might make the statute run afoul of the Supreme Court decision in Members of City Council of City of Los Angeles v. Taxpayers for Vincent, which held: "To create an exception for appellees' political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination. Moreover, the volume of permissible postings under such a mandated exemption might so limit the ordinance's effect as to defeat its aim of combating visual blight." 466 U.S. 789, 816 (1984). Until these arguments are fully advanced and developed by the parties, it is another good reason for us not to include them in this decision.

messages and speakers based on the content of their speech. In particular, Plaintiffs assert that the Act discriminates against small, unpopular, and poorly-funded charities who lack the resources to hire or engage their own employees or volunteers to make telephone sales calls. The state counters that the Act imposes a content-neutral restriction on the manner in which telephone sales calls are to be conducted, which is justified in view of the legislative finding that the inundation of telephone sales calls constitutes an unwelcome intrusion into residential privacy.

It is a well-settled principle of constitutional law that "regulations designed to restrain speech on the basis of its content are subject to strict scrutiny and are presumptively invalid under the First Amendment." Schultz v. City of Cumberland, 228 F.3d 831, 840 (7th Cir. 2000) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986); Stromberg v. California, 283 U.S. 359, 368-69 (1931)). Supreme Court decisions make clear that the terms of content-based regulations are those that "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994).

Content-based regulations are constitutionally suspect "because their purpose is typically related to the suppression of free expression and thus contrary to the First Amendment imperative against government discrimination based on viewpoint or subject matter." Schultz, 228 F.3d at 840 (citing Texas v. Johnson, 491 U.S. 397, 403 (1989)). Such regulations are "subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others." Hill v. Colorado, 530 U.S. 703, 735 (2000) (Souter, J. concurring) (citing United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 812 (2000); R.A.V. v. St. Paul, 505 U.S.

377, 382 (1992); cf. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972)).

However, a government restriction of speech is considered to be content-based only "if it is imposed because of the content of the speech . . . and not because of offensive behavior identified with its delivery." Hill, 530 U.S. at 737 (Souter, J. concurring) (citing Ward, 491 U.S. at 791 (stating "[t]he principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys")); see also United States v. O'Brien, 391 U.S. 367, 382 (1968) (explaining the distinction as "the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful").

"[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981) (citing Adderley v. Florida, 385 U.S. 39, 47-48 (1966); Poulos v. New Hampshire, 345 U.S. 395, 405 (1953); Cox v. Louisiana, 379 U.S. 536, 554 (1965)), and government regulations have been consistently upheld which "impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (citing Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

Content-neutral regulations are more acceptable under First Amendment jurisprudence

because, "[w]hen the government treats all expression equally without regard to the ideas or messages conveyed, courts can be more certain that the government intends to serve important interests unrelated to suppression of speech and is not acting with censorial purpose." Schultz, 228 F.3d at 841. Using content-neutral regulations, the government may institute "reasonable time, place or manner regulations that apply to all speech alike" since such regulations merely control the "surrounding circumstances of speech without obstructing discussion of a particular viewpoint or subject matter." Id.[9]

Government restrictions on speech will be deemed content neutral "even if [the restriction] has an incidental effect on some speakers or messages but not others." Ward, 491 U.S. at 791 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986)); see also United States v. O'Brien, 391 U.S. 367, 370 (1968) (upholding a statute prohibiting the burning of draft cards as applied to a draft protestor); Madsen v. Women's Health Center, Inc., 512 U.S. 753, 762-63 (1994) (holding that "the fact that the injunction [only] covered people with a particular viewpoint does not itself render the injunction content or viewpoint based")). On the other hand, even content-neutral regulations are not valid under the First Amendment if the regulation "results in removing a subject or viewpoint from effective discourse (or otherwise fails to advance a significant public interest in a way narrowly fitted to that objective)." Hill v. Colorado, 530 U.S. 703, 736 (2000) (Souter, J. concurring) (citing Ward, 491 U.S. at 791).

III. *First Amendment Analysis of the Act.*

In conducting a First Amendment analysis, the Court must examine the government's

[9] For example, the Supreme Court has upheld a restriction on the use of sound amplification at an outdoor bandshell, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), and an ordinance prohibiting targeted residential picketing. Frisby v. Schultz, 487 U.S. 474, 488 (1988).

justification for the Act to determine whether it imposes a content-neutral regulation on speech. Weinberg v. City of Chicago, 310 F.3d 1029, 1037 (7th Cir. 2002) (citing Ward, 491 U.S. at 791).

A. *Content Neutral Justification for the Act.*

In the case at bar, we acknowledge that good arguments can be made on both sides of the issue concerning whether the Act is, in fact, a content-neutral time, place or manner restriction. Whether a charity violates the ordinance turns on whether, at some point during the telephone call, the caller touches on one of the three restricted topics which constitute a "telephone sales call."[10] In contrast, it appears a charity could successfully steer clear of violating that statute if the caller were to ask a respondent to sign a petition or simply inform the person of the charity's mission or latest accomplishments. Only by examining the specific content of a telephone solicitor's speech could authorities determine whether the ordinance was violated. This approach seems strongly to suggest a content-based restriction. See Gresham v. Peterson, 225 F.3d 899, 905 (7th Cir. 2000) (citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993); Ward, 491 U.S. at 791).

However, the determination of content-neutrality rests not so much on the specific content of the communication as on the legislative justification for the restrictions. "[A]s Ward and more recently Hill . . . emphasized, the inquiry into content neutrality in the context of time,

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[10] As defined in IC 24-4.-2-9:

> (1) Solicitation of a sale of consumer goods or services.
> (2) Solicitation of a charitable contribution.
> (3) Obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.

place or manner restrictions turns on the government's justification for the regulation." Gresham, 225 F.3d at 905-06. Here, the state justifies the Act's restrictions on telephone sales calls on the grounds that the sheer volume of this category of calls unreasonably and objectionably intrudes on the residential privacy of individuals who have affirmatively given notice that they desire not to be so disturbed. This justification, it seems to us, is suitably content-neutral since it is not premised on a "disagreement with the message [a call] conveys," but rather solely on the "offensive behavior identified with its delivery." See Hill, 530 U.S. at 737.

The specific language of the Act reinforces our judgment that in enacting the restrictions the state "intend[ed] to serve important interests unrelated to suppression of speech and [was] not acting with censorial purpose." See Schultz, 228 F.3d at 841 Under the terms of the Act, all telephone sales calls are treated "equally without regard to the ideas or messages conveyed." Id. More importantly, no viewpoint is declared unfit for expression. The Act proscribes the involvement of professional telemarketers, who perform outside the direct control of a charity, from intruding on the privacy of individuals who have affirmatively indicated that they wish to be spared such an intrusion. The legislative findings undergirding these restrictions reveal that the inundation of calls by professional telemarketers, irrespective of any specific message, is intrusive and unwelcome in terms of residential privacy interests.[11]

Because the Act does not foreclosure a charitable organization from using its own employees or volunteers to make telephone sales calls, no content-based restriction ultimately is

[11] As noted previously, we have omitted from our analysis the non-charity-based exceptions to the Act. Whether those exceptions would withstand scrutiny in terms of their being content-neutral we do not decide, beyond noting that the state's briefs in this case extensively refer to the content of the exempted calls in justifying those exceptions.

imposed, which result is consistent with the state's expressed justification for the Act's limitations on the manner in which telephone sales calls are to be made. Under the Act, the content of a charity's sales request can be fully expressed in any call, so long as it is initiated by its own employees or volunteers. We are not persuaded that the substantive message of particular charities, as opposed to the behavior of professional telemarketers and the overwhelming volume of calls they initiate, is curtailed by Indiana's do-not-call statute.[12]

The Act, in targeting the unwelcome inundation of calls by professional telemarketers into private residences which the residents themselves have deemed intrusive, constitutes a valid content-neutral government regulation on speech. We proceed next to determine whether the Act satisfies the applicable standards for a reasonable time, place and manner restriction in service of a significant governmental interest.

B. *Significant Governmental Interest in Residential Privacy*

A valid time, place, and manner regulation must "serve a significant governmental interest." Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981). The state asserts that the Act serves such a "significant governmental interest" in that it is designed to protect the residential privacy of individual telephone subscribers.

Protecting residential privacy has long been recognized by Supreme Court decisions as a pre-eminent governmental interest. Indeed, an individual's right "to be let alone" in the privacy of the home has been repeatedly upheld on the grounds that the home is "sometimes the last

[12] Were we to conclude, as Plaintiffs urge, that the Act disproportionately impacts small, unpopular, or poorly-funded charities, this fact alone would not suffice to demonstrate that the Act imposes a content-based regulation. See Hill, 530 U.S. at 736 (Souter, J., concurring) (explaining that the presumption of content-neutrality is not abrogated merely by a showing that the prohibited conducted has an "association with a particular subject or opinion").

citadel of the tired, the weary, and the sick." Carey v. Brown, 447 U.S. 455, 471 (1980) (quoting Gregory v. Chicago, 394 U.S. 111, 118 (BLACK, J., concurring); citing Stanley v. Georgia, 394 U.S. 557 (1969); Rowan v. United States Post Office Dept., 397 U.S. 728 (1970); FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Payton v. New York, 445 U.S. 573 (1980)). In order to protect the privacy of the home, Supreme Court rulings have "traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property." Rowan, 397 U.S. at 737 (citing Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943)); see also .

Given this firmly recognized governmental "interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society," Brown, 447 U.S. 455, 471 (1980), we conclude that the Act clearly passess this threshold test as advancing a significant governmental interest.

C. *Narrowly Tailored to Protect Residential Privacy*.

We next address whether the Act is narrowly tailored to achieve the significant governmental interest of protecting residential privacy. Plaintiffs maintain that the Act is not narrowly tailored because less restrictive means exist to protect residential privacy, such as prohibitions enacted through company-specific do-not-call lists. Plaintiffs also argue that the Act is not narrowly tailored to protect residential privacy because the various exceptions serve to undermine the state's ostensible goal of protecting residential privacy.[13] The state counters that

[13] Plaintiffs advance other grounds in support of their contention that the Act is not narrowly tailored which do not warrant full discussion. Their claims that the state has not taken sufficient steps to ensure the initial accuracy of the no-telephone-sales-solicitation listing, that the state has not established sufficient procedures to ensure that names and numbers are removed from the list when no longer valid, and that the Act it is not limited to residential telephone (continued...)

the Act's prohibitions are necessary because the less restrictive options (for example, the company-specific do-not-call lists) have not been effective. Moreover, the state contends that Act is sufficiently narrowly tailored "to serve the privacy interests of Indiana residents by restricting calls only where residents have so requested." Def.'s Resp. Brief at 68.

The Supreme Court explains that "[t]he requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " Ward, 491 U.S. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). Moreover, a proper narrowly tailored statute does not "burden substantially more speech than is necessary to further the government's legitimate interests" nor "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Id. On the other hand, a court cannot deem a statute unconstitutional merely because a "less–speech-restrictive" alternative exists as "long as the means chosen are not substantially broader than necessary to achieve the government's interest."[14] Id.

Applying these standards, we conclude that the Act before us is sufficiently narrowly tailored to achieve "a substantial government interest that would be achieved less effectively absent the regulation," Ward, 491 U.S. at 799 (internal quotation omitted), based on the

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[13](...continued)
numbers, besides lacking evidentiary support in the record, challenge the manner in which Indiana implements the Act and are not proper arguments in mounting a facial challenge to the statute.

[14] The Supreme Court explained: " 'The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted." Ward, 491 U.S. at 800 (quoting Albertini, 472 U.S. at 689).

following factors: (1) the Act creates a voluntary opt-in program that puts the choice of whether to restrict telemarketing calls in the hands of consumers; (2) less restrictive regulations have not proven effective in preventing the unwanted intrusion by telemarketing calls into residential privacy; (3) the Act materially furthers the government's interest of preventing unwarranted and excessive intrusions into residential privacy; (4) the exception for charities, which allows calls but only if they are made by their own employees or volunteers, does not vitiate the Act's efficacy and preserves other important First Amendment interests; (5) the Act is not susceptible to arbitrary applications; and (6) the Act is not over-inclusive because it prohibits a charity from utilizing the services of professional telemarketers in contacting recipients of telephone sales calls. We examine each of these specific grounds in detail below.

(1) *Voluntary Opt-In Program.*

In terms of being narrowly-tailored, the most significant provision in the Act is that the prohibitions against telephone solicitors extend only to residents who have affirmatively registered their desire not to receive such calls. Thus, individual residents are free to decide for themselves whether they wish either to receive or to bar telemarketing calls from reaching them at their personal residences. The Act's prohibitions, so limited, ensure that telephone solicitors are prevented from contacting only the unwilling, unconsenting recipients of their calls.

The Supreme Court has held that similar statutes which empower individuals to block unwanted intrusions of speech into their private residences are entirely consistent with the First Amendment. Indeed, the Supreme Court declared:

> To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit. . . . The ancient

> concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

Rowan v. U.S. Post Office Dept., 397 U.S. 728, at 736-37 (internal citation omitted).[15]

Accordingly, our analysis brings us to the conclusion that the Act's voluntary opt-in program is sufficiently narrowly tailored as not to "burden substantially more speech than is necessary to further the government's legitimate interests." Ward, 491 U.S. at 799.

(2) *Less Restrictive Regulations Have Proven Ineffective.*

The undisputed evidence adduced here reveals that company-specific do-not-call lists have not proven effective in limiting or eliminating unwanted intrusions by telemarketers. See Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4579, 4631 n. 606 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310) (finding: "The record in this matter overwhelmingly shows . . . that company-specific approach is seriously inadequate to protect consumers' privacy from an abusive pattern of calls placed by a seller or telemarketer.") This evidence makes us wary, particularly in the context of a facial challenge to the Act, of "second-guess[ing] the [Indiana General Assembly's] judgment that many citizens have difficulty dealing with these intrusions

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[15] Plaintiffs cite Pearson v. Edgar as support for the proposition that a statute which allows residents only to reject certain kinds of solicitation "cannot be said to advance the interest of residential privacy 'in a direct and material way.' " 153 F.3d 397, 404 (7th Cir. 1998) (invalidating a statute which allowed residents to prohibit only real estate solicitation) (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)). We believe Plaintiffs' reliance on this case is misplaced. In Pearson, the Seventh Circuit conditioned its holding on the "fact that the state produced 'no evidence in this case that real estate solicitation harms or threatens to harm residential privacy.' " Id. (quoting Pearson v. Edgar, 965 F.Supp. 1104, 1109 (N.D.Ill.1997)). The case at bar is distinguishable on two grounds: First, the state produced extensive evidence that telephone sales calls can constitute an extensive and unwelcome intrusion on residential privacy; second, Indiana's statute prohibits all telephone solicitations, *except* in those limited cases when the state determined that such calls did not excessively intrude on residential privacy or were otherwise justified because of other compelling First Amendment interests. Accordingly, we find the quoted language in Pearson not controlling here.

and reasonably need the State's help in the form of a statute that imposes on the caller a duty to act in the manner that common courtesy should dictate." National Federation of the Blind of Arkansas, Inc. v. Pryor, 258 F.3d 851, 856 (8th Cir. 2001). Accordingly, we defer to the reasonable, indeed compelling, findings of Indiana's legislature that more restrictive prohibitions, that is to say, those embodied in the Act, were necessary in order to adequately protect the residential privacy of Indiana citizens. See Ward, 491 U.S. at 799 .

(3) *The Act Materially Furthers Protection of Residential Privacy.*

In contrast to the ineffectiveness of company-specific lists, the undisputed evidence demonstrates that the Act's general prohibitions have already dramatically reduced the burden placed on residents from the inundation of unwanted telemarketing calls. The survey commissioned by the Indiana Attorney General generated data revealing that individuals who joined the no-telephone-sales-solicitation listing experienced an 84% decrease in their average volume of "telemarketing calls received per week," as compared to a decline of only 32% for individuals who elected not to join the no-telephone-sales-solicitation listing. See generally Dec. of Tom W. Smith and attached Exs. B, C, D. Clearly, the Act's prohibitions are having the intended effect of substantially reducing the number of unwanted intrusions from telephone sales calls and that, in allowing limited exceptions, its efficacy has not been demonstrably diminished.

(4) *Exception for Charities Using Their Own Employees and Volunteers.*

The Act's prohibitions do not extend to all telephone sales calls made on behalf of charities, as we have previously noted, only to those that are not made by the charities' own employees and volunteers, which is further evidence that the restrictions in the Act are narrowly-tailored. The Indiana General Assembly's reasoning appears to have been that direct supervision

by a charity over its own employees and volunteers would curtail both the excessively high volume of calls as well as any other abuses that would more likely result from telemarketing calls.

In terms of legal analysis, the Supreme Court has held that this type of limited exception to a statute's otherwise broad inclusiveness does not render the statute unconstitutional. See Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 811 (1984) (approving an exception to a general statute because "private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds").

In light of the empirical evidence, it appears that the state's hypothesis that charities would keep their own employees and volunteers on a short leash has been confirmed, based on the substantial decrease in the number of telephone sales calls received by Indiana residents who have registered their telephone numbers despite this limited exception applicable to charitable solitications.

In any event, the exception for charities who utilize their own employees or volunteers to make telephone solicitations serves other important, countervailing First Amendment interests by preserving this significant opportunity for charities to generate support for their respective causes. See Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 789 (1988) (holding that a charity's "solicitation of charitable contributions is protected speech" under the First Amendment). The Act's limited exception for charities is thus a reasonable and narrowly-tailored restriction, reflecting an appropriate balance between competing governmental interests.

(5) *Act Not Susceptible to Arbitrary Application.*

The Act's provisions impose bright-line prohibitions not dependent on governmental

discretionary authority to enforce its terms through specific, ad hoc determinations of speakers or topics that are permitted or foreclosed. Indeed, the Act is not the type of regulation which is "open to the kind of arbitrary application that [the Supreme] Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981).[16] Accordingly, the Act does not give rise to concerns that it could be utilized as a backdoor means of imposing impermissible content discrimination.

(6) *Act is Not Over-inclusive.*

Plaintiffs argue that the Act is over-inclusive because it prohibits their telephone

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[16] See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147, 150-153 (1969) (discussing the unconstitutionality of a statute which "conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways"); Cox v. State of Louisiana, 379 U.S. 536, 555-58 (1965) (holding a statute unconstitutional which "provided that there could only be peaceful parades or demonstrations in the unbridled discretion of the local officials"); Staub v. City of Baxley, 355 U.S. 313, 321-325 (1958) (finding: "It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms"); Largent v. Texas, 318 U.S. 418, 422 (1943) (explaining that conditioning "dissemination of ideas . . . upon the approval of [a government] official" constitutes "administrative censorship in an extreme form"); Cantwell v. State of Connecticut, 310 U.S. 296, 307 (1940) (holding that "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution"); Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 164 (1939) (concluding that "a municipality cannot . . . require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens"); Hague v. Committee for Indus. Organization, 307 U.S. 496, 516 (1939) (stating that a statute which allows a government official "to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage' . . . can thus . . . be made the instrument of arbitrary suppression of free expression of views . . .").

solicitations to their own members and prior donors. This contention is unpersuasive for several reasons.

Telephone sales calls to charities' own members and previous donors would not likely be deemed by such individuals an unwelcome intrusion into their residential privacy. Thus, under the Act, if members of and prior donors to a charity whose telephone numbers are on the no-telephone-sales-solicitation listing but nonetheless wish to receive telephone solicitations from professional telemarketers representing said charity, they can and probably would give their permission to the charity to receive its telephone solicitations. Charities, in any case, are not prohibited from contacting their members or prior donors as long as the calls are made by their own employees or volunteers (whom individual charities may be well-served to recruit, given the targeted residents' previously demonstrated willingness to make donations).

Finally, the evidence considered by the Indiana General Assembly in enacting this statute included the finding that professional telemarketers, who are often (perhaps usually) paid on commission, are likely to resort to more aggressive tactics, make calls when residents least desire them, draw on their expertise in overcoming residents' attempts to terminate the calls, and make as many solicitation calls as possible in a given time-frame. From this, we hold that there is a reasonable basis for distinguishing between professional telemarketers and charities' own employees or volunteers and, therefore, Plaintiffs' arguments of over-inclusiveness are unavailing.[17]

D. *Ample Opportunities for Alternative Expression.*

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[17] As we have previously mentioned, the Legislature's assumption that a charity would keep its own employees and volunteers on a short leash, resulting in reasonable limits on the number and nature of the telephone sales calls made on charity's behalf, is reasonable and factually well-founded. See, supra, Section III(C)(4).

For the Act to pass constitutional muster as a valid time, place and manner restriction, "it must also be sufficiently clear that alternative forums for the expression of respondents' protected speech exist despite the effects of the [Act]." Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981). We do not deem the Act to be vulnerable to Plaintiff's legal challenge on this ground for the following reasons: First, as we discussed at length, the Act does not prevent any charity from calling telephone numbers on the no-telephone-sales-solicitation listing as long as the calls are made by an employee or volunteer of the charity. Second, the Act does not prohibit communications with Indiana residents in any other context – in person, by leaflet, by direct mail, by the internet, or through newsprint, television, or radio appeals. Despite the Act's limited prohibition on telephone solicitations, a charity has ample opportunities through numerous alternative forums to contact any Indiana resident to solicit support, including financial contributions, and to exercise its First Amendment free speech rights.

IV. *The Act Merely Effectuates Individual Preferences.*

The state's defense of this statute would foreclose all First Amendment analysis as unnecessary because "[t]he Act does not represent a unilateral government prohibition or preference. It merely effectuates the individual choices of over 1.2 million Hoosier households . . . which is a critical distinction under the First Amendment." Def.'s Resp. Brief at 29. In support of this proposition, the state cites principally to a trio of Supreme Court decisions: Hill v. Colorado, 530 U.S. 703 (2000); Frisby v. Schultz, 487 U.S. 474 (1988); and Rowan v. Unites States Post Office Dept., 397 U.S. 728 (1970). This contention, however, in our judgment, misapprehends and misinterprets controlling precedent.

In both Hill and Schultz, the Supreme Court determined that the statutes at issue were

content neutral under the legal tests elaborated in Ward. See Hill, 530 U.S. 713 n.19 (explaining that "petitioners concede that the test for a time, place, and manner restriction is the appropriate measure of this statute's constitutionality."); see also Hill, 530 U.S. at 719-30 (analyzing the Colorado statute under the three factors announced in Ward); Schultz, 487 U.S. at 482 (explaining: "We accept the lower courts' conclusion that the Brookfield ordinance is content neutral. Accordingly, we turn to consider whether the ordinance is narrowly tailored to serve a significant government interest and whether it leaves open ample alternative channels of communication" (internal quotation omitted)). Our reading of these two, recent Supreme Court decisions provides no rationale for sidestepping an analysis of the Act under the First Amendment's content-neutral rubric.[18] Assuming *arguendo* that the Supreme Court has created an exception to the need for a First Amendment analysis, we do not think the exception would apply here. The statutes under review by the Supreme Court that purport to empower individual decisions to avoid undesirable speech have always invested complete discretion in the targeted individuals to choose what speech they wished to escape . See Hill, 530 U.S. at 7 (quoting the relevant language in the statute which provides: "No person shall knowingly approach another person within eight feet of such person, *unless such other person consents* . . .

[18] We acknowledge the state's interpretation of Hill, Playboy, and Rowan is not entirely implausible. See, Rowan, 397 U.S. at 738. (stating: "In effect, Congress has erected a wall--or more accurately permits a citizen to erect a wall--that no advertiser may penetrate without his acquiescence. *The continuing operative effect of a mailing ban once imposed presents no constitutional obstacles*;") (emphasis added). However, we are reluctant to rely on any arguable exception to the First Amendment which the Supreme Court has not explicitly endorsed. If such an exception exists, the appropriate analysis appears to be a balancing test between the interest of the individual in avoiding unwanted speech against the interest of the speaker in spreading their message. See Rowan, 397 U.S. at 736 (holding that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate").

." (emphasis added)); Rowan, 397 U.S. 728, 737 (noting: "Both the absoluteness of the citizen's right under [§] 4009 and its finality are essential . . . . In operative effect the power of the householder under the statute is unlimited"); see also, United States v. Playboy, 529 U.S. 803, 816 (2000) (stating: "No one disputes that § 504, which requires cable operators to block undesired channels at individual households upon request, is narrowly tailored to the Government's goal of supporting parents who want those channels blocked").

Unlike the statutes reviewed in Hill, Playboy, and Rowan, the Act at bar does not empower individual telephone subscribers to selectively and specifically decide which speech they seek to limit. The state concedes this important distinction, explaining:

> Given the multiplicity of potential callers, the state can hardly be expected to allow each resident to create a personalized list of callers from whom a resident does not wish to receive calls. . . . Thus Indiana is left to delineate the set of calls that seem [sic] most commonly reviled, and to make the list applicable only to that group.

Def.'s Resp. Brief at 41.[19] Because the Act targets speech the state has determined can and should be restricted, the state's argument that the Act reflects merely the individual preferences of residential telephone subscribers loses its force.

Thus, even if we were to assume that Supreme Court precedent recognizes an exception to the First Amendment for regulations that "merely effectuate individual choices," we are of the view that this statute does not satisfy the three requirements which would entitle it to such treatment.

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[19] While it is true that individual telephone subscribers who join the no-telephone-sales solicitation listing can selectively exempt parties from its prohibitions or prohibit parties otherwise exempted, these provisions do not transform the effect of the Act, and the underlying government policy decisions it reflects, into a speech restriction reflecting only the individuals' choices.

V. *The Act Does Not Constitute a Prior Restraint on Speech.*

In answer to Plaintiffs' contention that the Act imposes a prior restraint on speech, because it simply empowers private citizens to prevent telephone solicitors from intruding into their own homes with unwelcome, unrequested calls, we see no First Amendment problem. The Act does not authorize residents to "affect any other activity at any other location or relating to any other person. These restrictions thus do not constitute an unlawful prior restraint." Hill, 530 U.S. at 735; see also Ward, 491 U.S. at 795, n. 5 (explaining: "the regulations we have found invalid as prior restraints have 'had this in common: they gave public officials the power to deny use of a forum in advance of actual expression' " (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)). The Act, in our view, does not impose these constraints and thus does not constitute a prior restraint on speech.

VI. *Issue of Federal Preemption of the Act.*

In supplemental filings, Plaintiffs raise the (false, in our opinion) specter of federal preemption relating to the Act's effect on interstate telephone sales calls. Citing a decision by the Federal Communications Commission ("FCC") that "more restrictive state efforts to regulate interstate calling would almost certainly conflict with [FCC] rules [establishing a national do-not-call list]," (FCC Report and Order, FCC 03-153, p. 50 ¶ 82 (July 3, 2003), Plaintiffs seek to avoid compliance with this Indiana statute. However, FCC preemption does not foreclose Plaintiffs' compliance or moot this constitutional challenge, since the statute authorizing the FCC's national do-not-call-list does not include charities, which authority Congress granted to the Federal Trade Commission ("FTC"). As of January 29, 2003, the FTC's official position was reportedly as follows:

> At this time, the Commission does not intend the Rule provisions

> establishing a national 'do-not-call' registry to preempt state 'do-not-call' laws. . . . At this time, the Commission specifically reserves further action on the issue of preemption until sufficient time has passed to enable it to assess the success of the approach outlined above.

FTC Order on Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4580, 4638 n.696. Accordingly, pending further action and/or clarification by the FTC, we hold that none of the Act's provisions as challenged here in Plaintiffs' lawsuit are preempted by federal regulation.

VII. *Plaintiffs' Right of Association.*

Plaintiffs initially maintained that the Act violates their right to associate with their own members who register with the no-telephone-sales-solicitation listing. As Plaintiffs did not develop this argument in their submissions to the court, we assume it has now been abandoned. If not abandoned, the argument nonetheless fails for lack of any evidence to show that the Act impermissibly interferes with any associational rights. The Act simply proscribes Plaintiffs' use of one form of communication which the state has deemed intrusive enough to warrant such regulation. It in no way prevents Plaintiffs from communicating with their members through all the other virtually unlimited means. See, supra, Sections III(C)(6) and (D).

VIII. *Plaintiffs' Facial Challenge under the Indiana Constitution Is Barred by the Eleventh Amendment.*

Plaintiffs ask this federal court to declare the Indiana statute unconstitutional under Article 1, § 9 of the Indiana Constitution. This relief is unavailable, however, under the Eleventh Amendment to the U.S. Constitution because a Plaintiff is barred from bringing suit in federal court challenging state statutes on state constitutional grounds. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 121 (1984) ("A claim that state officials violated state laws in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment . . . [and] this principle applies as well to state-law claims

brought into federal court under pendent jurisdiction.") Plaintiffs cannot obtain this relief in this forum

Conclusion

For all the reasons explicated above, we declare that the Indiana Telephone Privacy Act is a constitutionally-valid, content-neutral, time, place, and manner restriction on speech. Accordingly, Defendant's Motion for Summary Judgment is GRANTED and Plaintiffs' Crossmotion for Summary Judgment is DENIED. IT IS SO ORDERED.

Date: _____

_____
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Copy to:

Bryce H Bennett Jr
Riley Bennett & Egloff
141 E Washington Street
Suite 400
Indianapolis, IN 46204

Errol Copilevitz
Copilevitz & Canter LLC
423 West 8th Street
Suite 400
Kansas City, MO 64105

Doug Webber
Deputy Attorney General
Fifth Floor Igc South
402 W Washington Street
Indianapolis, IN 46204